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No. 87-7116

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

ALVIE J. HALE,

Petitioner,

vs.

THE STATE OF OKLAHOMA,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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July 1, 1988

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IN THE SUPREME COURT OF THE UNITED STATES

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Robert H. Henry, Attorney General of Oklahoma, respectfully submits this as the Response to Petition for Writ of Certiorari herein.

In the following statement of facts the Petitioner is referred to as a defendant and transcript references are to the original trial transcript.

STATEMENT OF THE FACTS

About 9:30 the night of October 10, 1983, at half-time of the Monday night football game, William Jeffrey Perry left his parent's home in Tecumseh for his own residence, which was about a block away (Tr. 218,220). This was the last time any of his family saw him alive (Tr. 220). The last family member to have any contact with Jeff Perry was his sister, Veronica Perry Sharp, who spoke with him by telephone about 11:30 that same night (Tr. 248,255).

Early the next Tuesday morning, Tuesday, October 11, 1983, seventeen-year-old Janet Miller McKenzie, who lived with her family in rural Earlsboro, was preparing for school as usual (Tr. 305-306). She was interrupted when a man, standing outside the bathroom window and who she later identified as the defendant, asked to use the telephone (Tr. 306-307,308). After she told the defendant that there was no telephone in the home, the defendant got into a white stationwagon and drove out of the driveway a short distance (Tr. 307). It was then that Ms. McKenzie noticed a second

man, clad only in white undershorts, in a field across from her house (Tr. 307). This man was apparently injured, holding his side, bent down, and hollering for help (Tr. 307-308). The defendant "raced back down the driveway . . . [and stopped and pulled] the second man over the fence to put him in the car," and then drove off (Tr. 308).

Sometime after 8:00 that same morning, the defendant drove into the yard of his father's rural Earlsboro home in a cream and wood-grain stationwagon owned by his father, Alvie James Hale, Sr. (Tr. 321-322). The defendant left a few minutes later in the same stationwagon (Tr. 322).

That same morning at approximately 8:30 a.m., Joan Perry, Jeff Perry's mother, arrived at the Tecumseh Farmers and Merchants Bank which she and her husband managed (Tr. 219,220). She was alarmed when her son, who also worked at the bank, and who usually arrived by 8:00 a.m., did not arrive and missed several morning appointments (Tr. 220-221). About 9:15 a.m., Mrs. Perry asked her daughter Veronica (the victim's sister) to go by Jeff Perry's house and check on him (Tr. 253). When Veronica did so, she found his car still in the driveway and his door unlocked both "unusual for Jeff" (Tr. 253). Now frightened, Veronica entered the home and called out for her brother (Tr. 254). Getting no response, she went down the hall to his bedroom where "everything was just as it was before" (Tr. 254). All his clothes were there, including those he had laid out in a second bedroom for the morning, as was his habit (Tr. 254). His identification, billfold and keys were in the house (Tr. 254). An alarm clock was knocked over in the bedroom, and except for tennis shoes, none of the clothes he had worn the night before were in the house (Tr. 254-255).

The evidence revealed that the defendant had returned to Alvie Hale, Sr.'s home a few minutes before 10:00 a.m., that same Tuesday morning, and asked to use his father's red and white GMC pickup truck. His father consented, and the

defendant used the truck until the next day (Wednesday, October 12, 1983) (Tr. 322-323).

Shortly thereafter on Tuesday at about 10:30 a.m., Mrs. Perry received a call at the bank from a man concerning her son (Tr. 221). When that conversation was interrupted, the man said he would call again, this time at her home, between 1:00 and 1:30 that afternoon (Tr. 221). Mrs. Perry arranged for her daughter, Veronica, to take the call (Tr. 221).

Veronica answered that 1:30 p.m. telephone call at the Perry's house, and was asked "Where is the money? Where is the $350,000?" (Tr. 248). When Veronica asked if her brother was all right, she was told "Jeff's fine. We have taken him to a lake cabin." (Tr. 249). She asked for a telephone number so her mother could return the call, but was refused and was assured the man would call back in an hour (Tr. 249). When Veronica told her mother of the substance of the call, Mrs. Perry immediately informed the Shawnee office of the Federal Bureau of Investigation of the kidnapping of her son and of the extortion demand (Tr. 222).

The remaining calls to the Perry residence were tape-recorded (Tr. 222). Mrs. Perry answered the first of the recorded calls shortly after 3:00 that same Tuesday afternoon (Tr. 222-223). She asked where her son was being held and was told "We have got him at a cabin at the lake." (Tr. 226). Her request to speak with him was refused, and she was asked again about the money and when it would be ready (Tr. 226). The man arranged to call again about 5:00 p.m. later that day (Tr. 227).

Most of the remaining calls were traced by Southwestern Bell Telephone Company employees, including the 5:00 p.m. call, which was the last call of the day (Tr. 228-229,257). The caller, disguising his voice with a heavy accent, again asked about the preparation of the money (Tr. 229-230). Mrs. Perry again asked to speak with her son, and was again denied (Tr. 230-232). Arrangements were made for the man to call

the Perry residence again at 10:00 the next morning (Tr. 230,231,232). This call was traced to a pay phone at the 7-Eleven Store at Harrison and Federal in Shawnee (Tr. 258).

In the meantime, FBI special agent Douglas Clark and bank employees were preparing the ransom money. The money was photocopied, placed in two Amway boxes, $200,000 in a smaller one-foot square box, and $100,000 in a second, larger box (Tr. 272-274). The money was ultimately handed over to Mrs. Perry and FBI Special Agent Danny Harrell (Tr. 274).

As promised, Mrs. Perry received a call about 10:20 the morning of Wednesday the 12th (Tr. 232). She told the extortionist she had arranged for the money, and tried but failed to talk him into a simultaneous exchange of the money for her son (Tr. 232, 233). She was again assured that her son was safe, and was told she would be contacted again in an hour (Tr. 233-234). This call was traced to the American Inn at 5501 N. Harrison in Shawnee, where between 10:00 and 10:30 a.m. motel employee Connie George saw the defendant using the pay phone, with a red and white pickup truck parked nearby (Tr. 263,264,265). The defendant was wearing a white shirt and blue jeans or blue slacks (Tr. 266). She talked to FBI special agents about the caller within the next thirty to forty-five minutes (Tr. 265).

The next call to the Perry residence came about 11:40 a.m., Wednesday, and was again received by Veronica, the victim's sister (Tr. 249). Another plea was made to speak with Jeff Perry, and again was rejected (Tr. 251-252). A second plea for an exchange was also turned down (Tr. 252). The man was told the money would not be ready for fifteen to thirty minutes (Tr. 252). He agreed to call back with instructions at noon (Tr. 252).

About the same time, FBI special agents Herman Ng and Coy Copeland watched the defendant drive a red and white Chevy pickup into the Holiday Inn parking lot at Harrison and Interstate 40 (Tr. 268). He parked and went inside the

building, emerging a short time later (Tr. 269). The defendant was wearing a white shirt and blue pants (Tr. 268). Special agents Ng and Copeland followed the defendant as he drove south on Harrison in the red and white pickup and stopped at the 7-Eleven at Harrison and Federal (Tr. 269). The defendant got out of the pickup and looked at the phone number on the pay phone on the outside of the building (Tr. 269,288-289).

The next call came shortly after noon (Tr. 234). Mrs. Perry was told first to go to the pay phone at the 7-Eleven Store at Harrison and Federal and that she would be told there to go to other telephone booths before being given final instructions on the drop site for the money (Tr. 235,236,237). Mrs. Perry again asked about her son, and was told that if everything was in order, he would be released two and one-half to three hours after the ransom was picked up (Tr. 235,236). The caller told her he "had to hit" Jeff Perry Tuesday morning "to calm him down, but he's fine." (Tr. 236). Mrs. Perry told the man she would be driving a blue Lincoln Town Car, and arranged with the caller to have her daughter go with her (Tr. 237-238). This call was traced to the pay telephone at the Wolverine Kwik Stop at Wolverine and Harrison (Tr. 258-259).

FBI Special Agents Ng and Copeland watched the defendant as he drove the red and white pickup into the Kwik Stop about two miles north of Interstate 40 on Harrison at Wolverine (Tr. 270). Between noon and 12:13 p.m., the agents watched as the defendant made a call from the pay telephone at that location (Tr. 270-271).

Mrs. Perry took the boxes of money and, accompanied by FBI Special Agents Karen Spandenberg and Jim Elroy, went to Harrison and Federal as instructed (Tr. 241). Agent Spandenberg was driving, and Agent Elroy was out of sight on the floor of the back seat (Tr. 241). At the 7-Eleven Store, Mrs. Perry got out of the car and waited for the telephone to

ring (Tr. 241). When she received that call about 12:41 p.m., she was told to go to the 7-Eleven Store at Highland and Harrison and wait for another call there (Tr. 241). This call was traced by Southwestern Bell as coming from the Crocketts Smokehouse on Harrison in the block just south of the 7-Eleven Store (Tr. 259). The defendant was observed by Special Agent Nelson Bose as he went inside the Crockett's Smokehouse at that location, re-emerging two to three minutes later (Tr. 290). The defendant then left, headed south on Harrison in the red and white GMC pickup truck (Tr. 291).

Mrs. Perry and the agents with her went to the second 7-Eleven Store, at Harrison and Highland, as instructed (Tr. 242). In that call, she received final instructions from the caller (Tr. 242). She was told to leave Shawnee eastbound on Highland, to turn north on Highway 9A, passing over Interstate 40 and proceeding on north about one and one-half miles to where the pavement ends on that road (Tr. 242). She was told to leave the boxes of ransom money there (Tr. 242).

The trio in the Perry car proceeded as Mrs. Perry had been instructed, leaving the ransom money at the northwest corner of the intersection where the pavement on 9A ended (Tr. 242-243). Mrs. Perry herself saw the defendant's red and white Chevy pickup truck several times during the course of these last phone calls (Tr. 243). As she was placing the boxes of money at the side of the road, she could see that same vehicle approaching (Tr. 244). Frightened, she hurried back to the car (Tr. 244). By the time she finally got back to the car, the defendant's vehicle was only about two car lengths away (Tr. 244). She could clearly see the defendant, who she knew as a bank customer, and could tell he was dressed in a light-colored shirt (Tr. 244,245).

After seeing the defendant's red and white pickup truck head west on the Interstate, FBI Special Agent Douglas Clark and Captain Lahugh went to the ransom drop sight, found that the money was gone, then went back to Interstate 40 to follow

the defendant west (Tr. 276). The defendant eventually pulled off Interstate 40 on the Robinson Street exit into downtown Oklahoma City, passing on the east side of the Myriad Convention Center (Tr. 277). Agent Clark and Captain Lahugh saw two other FBI vehicles attempt to force the defendant's vehicle to the curb near the Sheridan Century Center Hotel (Tr. 277-278,283).

At this point, the defendant headed west on Sheridan at a high rate of speed with all three vehicles in pursuit (Tr. 278). The chase proceeded for about two and one-half miles through the downtown area at speeds around fifty miles per hour (Tr. 279, 280). The defendant's vehicle eventually hit drainage gutters ,crossing the street as he headed south from Tenth Street on Klein Street (Tr. 280). The red and white pickup became airborne as it hit the first gutter, became airborne again as it hit the second, turning 180 degrees in the air before coming to rest on top of a parked car on the west side of the street (Tr. 279). The defendant tried to accelerate as he landed, pulled forward, but was stopped as he collided head-on with one of the FBI vehicles (Tr. 279,286). The defendant was quickly surrounded by law enforcement personnel, who helped force the doors of the disabled vehicle open (Tr. 280). As he got out, grasping a $100 bill in his left hand, a bag of $100,000, of the ransom money, fell out of his lap to the street (Tr. 280,281,286,287). In the seat of the pickup was a $10,000 package of bills. The second bag was still in the small box, and the second box of money was still sealed shut (Tr. 281). All the money was recovered (Tr. 281).

Shortly after the defendant was taken into custody, which was about 4:15 p.m., FBI Special Agent Danny Harrell, along with another special agent and two Pottawatomie County Sheriff's deputies, arrived at the home of the defendant's father, Alvie James Hale, Sr., (Tr. 327,328,330). After receiving the senior Mr. Hale's consent, the house, the

property and the cream-colored station wagon were searched (Tr. 328-329). Jeff Perry's bullet riddled body was quickly discovered, wrapped in a dark tarp/trampoline cover in a metal grain storage shed about 200 yards behind the house (Tr. 330,332, 333-334). Agent Harrell obtained a .38 revolver and from a cabinet in the kitchen, three other weapons from Mr. Hale, Sr., as well as some towels he had taken from the front seat of the station wagon (Tr. 339,343). Two more towels and a windbreaker were discovered inside the trampoline cover with the body (Tr. 342,345).

Shawnee Police Detective John Moody helped search the stationwagon, finding bloodstains, fingerprints, and a spent bullet and cartridge (Tr. 359,360,361,362).

One fingerprint taken from the stationwagon matched fingerprints taken from the body of Jeff Perry (Tr. 421,425). A hair recovered from one of the towels inside the trampoline cover was similar to a sample of the defendant's hair and was likely to have come from him (Tr. 407,410). Bloodstains taken from a shoulder harness inside the stationwagon were consistent with blood taken from the body of Jeff Perry (Tr. 413). Blood taken from a plant in the area where Ms. McKenzie saw the injured man calling for help on Tuesday morning was not inconsistent with the victim's blood (Tr. 418).

Medical Examiner Dr. Chai S. Choi performed an autopsy on the body of Jeff Perry, finding at least five gunshot wounds (Tr. 440). There were wounds in the right leg; the right arm, which was broken; the abdomen, perforating the small intestine four times; and two wounds to the head (Tr. 440,443). The cause of death was primarily due to the head wounds, although the abdominal wound could have been fatal (Tr. 443,444). Dr. Choi recovered two bullets from the brain of Jeff Perry (Tr. 441,445). She estimated the time of death at between twenty-four and forty-eight hours before the

autopsy was performed at 11:00 a.m., Thursday, October 13, 1983 (Tr. 443,445).

Ballistics tests revealed that the bullets recovered from Jeff Perry's brain positively matched those fired from the .38 revolver taken from the Hale residence (Tr. 433-434).

The trampoline cover in which Jeff Perry's body was discovered was later matched to a trampoline frame at the defendant's residence (Tr. 363,365-366).

Other evidence revealed that at about 9:00 a.m. the morning before Jeff Perry was kidnapped (Monday, October 10, 1983), the defendant had gone to Donald Hobbs at his garden shop in Shawnee and asked to borrow Hobbs' light silver and black pickup truck (Tr. 292-293,294). The defendant took a dark tarp from his white stationwagon, threw it in the back of the pickup, and left (Tr. 293,295). The defendant returned the pickup to Hobbs around 11:00 to 11:30 that same morning.

Other testimony showed that Brenda Allison was working with her gardener in the yard of her home in Shawnee on Monday morning at approximately 10:00 a.m. (Tr. 299). A man she later identified as the defendant drove into her driveway in a light-colored pickup truck (Tr. 300). Mrs. Allison was told that her husband, an executive with a family-owned oil company, had been in an accident and had sent the defendant to take Mrs. Allison to the Shawnee Medical Center (Tr. 300). After being told by the defendant that her husband was alright, she said she would drive herself (Tr. 300). When Mrs. Allison arrived at the emergency room, she discovered her husband had not been in an accident, and was, in fact, still at his office (Tr. 301). This incident was reported to the police (Tr. 301-302).

The same day, the defendant had called a local car dealership, asking about buying a $15,000 Camaro Z-28 for his daughter (Tr. 388-389). The month before he had met with a

local realtor about buying a $150,000 home in Shawnee, for which he said he would pay in cash (Tr. 391-392).

However, the defendant's personal checking account at the Farmers and Merchants Bank was overdrawn (Tr. 245). His business account had been repeatedly overdrawn and ultimately closed out (Tr. 245). The bank had repossessed and sold his vehicle, and had repossessed his bakery equipment and was in the process of selling that (Tr. 245). His own father described the defendant as being in bad shape financially (Tr. 326).

An Oklahoma County Jail cellmate of the defendant, Mark Zackary Weaver, told authorities the defendant had told him he knew "how to get rid of" witnesses (Tr. 277). The defendant said to Weaver, "[J]ust tell them to get down, or kneel down and boom, boom." (Tr. 378). When Weaver was returned to the Oklahoma County Jail in January, he was beaten by the defendant and several others (Tr. 378). The defendant asked Weaver about statements he had made against the defendant to authorities (Tr. 379).

The defense presented testimony at trial from two other cellmates who said they had overheard no such conversations between the defendant and Weaver (Tr. 453,456). On cross-examination, both witnesses acknowledged that while they were not aware of the conversation, conversations could take place in jail outside the hearing of others (Tr. 454, 458-459). The defense presented no other evidence.

The jury returned a verdict of guilty on Count I, the Murder in the First Degree, and Count II, Kidnapping for Extortion.

No additional evidence was presented by either side in the second stage and the jury imposed the death penalty with regard to the murder charge and life imprisonment as to the kidnapping offense.

In support of the murder conviction, the jury found the existence of two aggravating circumstances: (1) the murder

was especially heinous, atrocious, and cruel; and (2) the murder was committed for the purpose of avoiding or preventing a lawful arrest for prosecution (Tr. 562).

SUMMARY OF ARGUMENT

The court below correctly decided the change of venue issue by relying on the applicable precedents of this Court. The Petitioner has wholly failed to show that any of the jurors who sat at his trial was so strongly affected by pretrial publicity that he or she could not set aside any initial opinions formed and decide the case solely on the evidence produced at trial. The mere presence of pretrial publicity is insufficient to create constitutional error unless the publicity so taints the jury that it cannot decide the case sole upon the proper evidence.

There was no unconstitutional "conflict of interest" between the Petitioner and his trial attorney. Petitioner has done nothing to rebut the general presumption that an attorney understands his duty of loyalty to his client. Petitioner has not shown that his trial counsel in any way was less than zealous in his defense as a result of counsel's suspicion that Petitioner had earlier attempted to burglarize his office.

Petitioner articulates no prejudice whatsoever from the fact that the state alleged an additional aggravating circumstance shortly before trial. In the absence of some articulable impact on Petitioner's case no further review is appropriate at this juncture.

Likewise, the instruction to the jury that the death penalty was a possible punishment for kidnapping did not prejudice the Petitioner inasmuch as the jury did not return a sentence of death for Petitioner's kidnapping conviction. This court need not spend its valuable and limited time reviewing issues which are immaterial to the case at hand.

PROPOSITION I

PETITIONER WAS NOT ENTITLED TO CHANGE OF VENUE.

The Petitioner complains that he should have been granted a change of venue because of pretrial publicity in the area and the fact that some members of the jury knew his family or were acquainted with members of his victim's family. As did the court below, (Hale v. State, No. F-84-208 hereinafter Slip Op. at 3-4), we analyze this claim in light of this Court's case in Irvin v. Dowd, 366 U.S. 717 (1961), in which the court stated:

> It is not required, however, that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court. (Citations omitted)

Id. 366 U.S. at 722-23. See also, Patton v. Yount, 467 U.S. 1025, 1035 (1984) (citing Irvin); Murphy v. Florida, 421 U.S. 794, 799 (1975) (also citing Irvin); and Chandler v. Florida, 449 U.S. 560, 581 (1981) (challenge to system of broadcasting trials required defendant to demonstrate presence of cameras impaired the ability of the jurors to decide the case only on the evidence before them, citing Murphy v. Florida, supra).

Petitioner filed a motion for change of venue in the trial court. At the hearing on that motion two witnesses testified. Their testimony demonstrated that, while immediately after the murder there was considerable press interest in the story, that interest had diminished by the

time the motion for change of venue was heard. After reviewing the testimony and newspaper accounts of the crime, the judge took the motion for change of venue under advisement until the conclusion of voir dire. During that voir dire, 37 prospective jurors were interviewed; 7 were excused for cause and 18 were peremptorily challenged. The court below noted that every juror who was challenged for cause was excused by the trial court including the single juror requested to be excused by defense counsel. Slip Op. at 3-4.

Petitioner points to no juror who sat in his case who should have been excluded under this Court's standard announced in Irvin v. Dowd, supra. Petitioner's argument rests upon the fact that there had been pretrial publicity in the community and that some jurors had formed opinions concerning the case. However, Petitioner has not demonstrated that the jurors who sat could not set aside any opinions which they had formed prior to trial. Therefore, he was not denied an impartial jury within the meaning of the Sixth Amendment.

Petitioner argues that the Oklahoma Court of Criminal Appeals uses an incorrect standard to decide change of venue issues. However, the court below relied upon this Court's opinion in Irvin v. Dowd, supra, and Murphy v. Florida, supra, to decide this issue. The court below relied upon the controlling law from this Court while the Petitioner does not rely on that law to advance his claim that he was denied an impartial trial. We respectfully submit that the court below ruled correctly and no further review of this issue is necessary.

PROPOSITION II

PETITIONER'S TRIAL COUNSEL WAS CONSTITUTIONALLY ADEQUATE.

Petitioner makes three related claims regarding the conduct of his original trial counsel. These claims springs

from an application to withdraw as attorney filed by Mr. George VanWagner, Petitioner's original trial counsel (O.R. 32). That application recited that counsel knew the Defendant whose office was across the hall from the attorneys in 1982 and portions of 1983. The application further recited that the attorney believed that the Defendant had attempted to burglarize his law office in early 1983, although there was not sufficient evidence to press charges. Because of this, the attorney "has a personal dislike, distrust and animosity toward the defendant which will prevent the desirable communication and trust that is necessary to an attorney-client relationship." (O.R. 32). A Court Minute Order written on the bottom of the motion reflects:

> Above application denied after consideration by the Court. The Court is of the opinion that the attorney will not permit personalities to effect [sic] his relationship or representation of defendant.

(O.R. 32). Petitioner makes no serious suggestion that trial counsel "threw" the case in order to punish the Petitioner for the suspected burglary attempt. We suspect such a result as highly unlikely in a capital murder case and ask this Court to be mindful of the general presumption that a lawyer is fully conscious of his over-arching duty of complete loyalty to his client. Burger v. Kemp, 483 U.S. ___, 107 S.Ct. ___, 97 L.Ed.2d 638, 651 (1987).

The court below found no abuse of the trial court's discretion in requiring counsel to overcome his personal feelings and to represent the Petitioner, relying upon this Court's opinion in Morris v. Slappy, 461 U.S. 1 (1983) for the proposition that there is no constitutional right to an attorney-client relationship free of animosity. In addition, the court below found this issue was not properly preserved for review on appeal because it was not raised in the Petitioner's Petition in Error. Slip Op. at 5.

The court below was correct. In Morris, supra this Court stated:

> The Court of Appeals' conclusion that the Sixth Amendment right to counsel "would be without substance if it did not include the right to a meaningful attorney-client relationship," 649 F.2d at 720 (emphasis added), is without basis in the law. No authority was cited for this novel ingredient of the Sixth Amendment guarantee of counsel, and of course none could be. No court could possibly guarantee that a defendant will develop the kind of rapport with his attorney-privately retained or provided by the public-that the Court of Appeals thought part of the Sixth Amendment guarantee of counsel. Accordingly, we reject the claim that the Sixth Amendment guarantees a "meaningful relationship" between an accused and his counsel. (Footnote omitted).

461 U.S. 1, 13-14. In a somewhat different context of possible conflict of interest this Court has stated that it will presume prejudice only if the Defendant demonstrates that counsel "actively represents conflicting interests" and that "an actual conflict of interest adversely affected his lawyer's performance". Burger v. Kemp, supra, 97 L.Ed.2d at 650 quoting Strickland v. Washington, 466 U.S. 668, 692 (1984) and Cuyler v. Sullivan, 446 U.S. 335, 348 (1980). Petitioner has failed to demonstrate that his lawyer actively represented his own interest rather than the Petitioners and simply has failed to rebut the general presumption that a lawyer is fully conscious of the over-arching duty of complete loyalty to his client. Petitioner's arguments are without merit.

On the present posture of this case the alleged "conflict of interest" between the attorney and his client presents no significant issue meriting this Court's attention. This does not foreclose subsequent relief in state proceedings for post-conviction relief or in a federal habeas corpus proceeding should Petitioner be able to develop facts which would indicate his client somehow under performed in revenge for the suspected burglary attempt. No relief need be granted at the present stage of proceedings.

PROPOSITION III

PETITIONER'S OTHER GROUNDS ARE WITHOUT MERIT AND PRESENT NO ISSUE WORTHY OF THIS COURT'S REVIEW.

Petitioner additionally complains that an aggravating circumstance was added immediately prior to trial. However, Petitioner points to no prejudice whatsoever suffered by him as a result of the addition of this aggravating circumstance. This Court should not grant certiorari to decide some abstract and ill defined question of federal law when the Petitioner himself can articulate no prejudice suffered by him as a result of the alleged error.

Finally, Petitioner seeks review of jury instructions in forming the jury that the death penalty was a permissible punishment for the crime of kidnapping, even though the jury did not return a death sentence for Petitioner's kidnapping conviction. Petitioner erroneously relied on Hicks v. Oklahoma, 447 U.S. 398 (1980), for the proposition that constitutional error occurs when the jury receives erroneous information about the range of punishment even if the sentence actually given is within the range authorized by law. Hicks does not stand for this proposition, but instead holds that where state law creates a right to jury sentencing the defendant has a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury in an exercise of its statutory discretion and that liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the state. Id. 447 U.S. at 346. Hicks is simply in apposite to the case at hand. Further, Petitioner suffered no prejudice by the erroneous jury instruction because the jury did not sentence him based upon the error. No further review by this Court is appropriate.

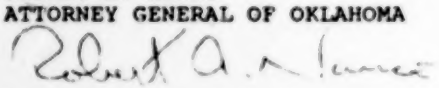
CONCLUSION

For reasons set out above, we respectfully submit that this particular case presents no significant federal issue

requiring decision by this Court. The requested Writ of Certiorari should be denied.

Respectfully submitted,

ROBERT H. HENRY
ATTORNEY GENERAL OF OKLAHOMA



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